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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. .....

DELANO B. KELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner hereby prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment of the trial court.

OPINIONS BELOW

A jury verdict was rendered against defendant; judgment was entered thereon on November 2, 1967. On appeal, the United States Court of Appeals for the Ninth Circuit filed its decision on April 10, 1970. The decision is attached to this petition as Appendix A.

JURISDICTION

A timely petition for rehearing *en banc* was denied on October 2, 1970, by the Court of Appeals for the Ninth Circuit, the Order Rejecting Petition For Rehearing *En Banc* being attached to this petition as Appendix B. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Supreme Court of the United States.

QUESTIONS PRESENTED

The following questions are presented for determination by the Court:

1. Whether the reporting of damaging extrajudicial hearsay statements at trial, when the witness to whom the hearsay is attributed is available for testimony, is violative of defendant's right of confrontation.

2. Whether the warrantless exploratory search of defendant's locked car parked outside his apartment was permissible as "incident to an arrest" when the search took place subsequent to defendant's arrest inside his apartment.

3. Whether *Chimel* should be applied retroactively

to invalidate the introduction of evidence which under post-*Chimel* standards was clearly the product of an illegal search and seizure.

4. Whether the introduction of evidence which was illegally seized in contravention of the Fourth Amendment, and which therefore should have been excluded, was prejudicial error in that it tended to create the impression that petitioner was guilty of a similar but prior and completely unrelated crime.

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . "

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because petitioner was indicted for violations of federal narcotics laws.

Delano B. Kelley, hereinafter petitioner, and Charles J. Coleman were both named in an eight-count indictment alleging illegal narcotics transfers. Petitioner and Coleman were both named in Counts 4, 5 and 6 relative to the sale of heroin on August 8, 1967. Petitioner alone was named in Counts 7 and 8 relative to a cocaine transfer on August 21, 1967.

Petitioner's trial began on October 31, 1967, and ended on November 2, 1967, when the jury returned its verdict. Petitioner was found not guilty on Count 4, and on Count 8 the trial court granted a motion for judgment of acquittal, since there was no evidence to support a guilty verdict of transferring cocaine in violation of 26 U.S.C. 4705(a). Petitioner was convicted on the remaining three counts.

One count alleged that on August 8, 1967, petitioner unlawfully sold and facilitated the sale of heroin which petitioner knew had been imported into the United States contrary to 21 U.S.C. 174. Another count alleged that on August 8, 1967, petitioner sold heroin without obtaining a written order form, in violation of 26 U.S.C. 4705(a). Finally, petitioner was convicted on a count which alleged that on August 21, 1967, he knowingly and unlawfully received, concealed and facilitated the concealment and transportation of cocaine which he knew had been imported in violation of 21 U.S.C. 174.

On November 27, 1967, the court sentenced petitioner to six years imprisonment on each of the three counts for which he was convicted, the terms to run concurrently.

On appeal, the Court of Appeals for the Ninth Circuit held *per curiam* that regarding the two heroin counts and the one cocaine count upon which the petitioner had been

convicted, if the cocaine count had stood alone, *Turner v. United States*, ... U.S. ....., 24 L.Ed.2d 610, would require reversal. Thus, the Court of Appeals admitted that the cocaine conviction was defective; however, it felt that since the term of imprisonment was set to run concurrently with the heroin convictions, there was no need to reverse.

At the trial, the prosecution called an undercover agent, officer Henry, as a witness. The trial court erred in permitting agent Henry to testify, over objections, as to conversations he had with Charles T. Coleman. Coleman was the subject of a separate criminal action and was not a party to the instant proceedings.

Agent Henry was permitted to introduce hearsay statements of Coleman which were seriously incriminating to petitioner. When petitioner objected, the court asserted that the evidence was offered "for the purpose of indicating the nature of the arrangements made" (RT 21). The trial judge then proceeded to "sustain" defense counsel's motion but nevertheless allowed the testimony to stand.

In addition, the manner in which agent Henry testified created the impression that the conversation he was relating was between *himself and petitioner* rather than between himself and *Coleman* (RT 13-16).

Thus, not only was damaging hearsay introduced but it was introduced in such a fashion as to suggest that petitioner had made self-incriminating statements.

Furthermore, agent Henry forced entry into petitioner's apartment, arrested him, and then, proceeding without permission or a search warrant, seized the keys to a car which petitioner had borrowed, and, on the pretext of a legitimate search incident to an arrest, went outside and opened the

trunk of the car and seized the cocaine which was allegedly concealed there (RT 53, 116).

REASONS FOR GRANTING PETITION FOR CERTIORARI

(A) Effective Denial Of Right Of Confrontation.

In this case the use of hearsay testimony for the alleged purpose of showing "setting" was directly contrary to the "confrontation" clause of the Sixth Amendment to the United States Constitution, and any such exception to the hearsay rule is thus unconstitutional and void and, consequently, any conviction obtained as a result thereof is constitutionally infirm.

Under *Barber v. Page*, 390 U.S. 719 (1968), the Court held that defendant's right of confrontation was abridged when the prosecution submitted a witness's incriminating evidence by way of the transcript of that witness's testimony at a preliminary hearing, when that witness is "available" for testifying at the trial.

It is submitted that the rule of *Barber* prohibits the use of the incriminating testimony of a witness *by second hand* in a criminal prosecution when that witness is "available" for trial. thereby abrogating the defendant's right and opportunity to confront and cross-examine that witness.

Under that principle, the introduction of damaging testimony of one individual by way of the hearsay testimony of another witness is violative of defendant's right of confrontation, in that it denies defendant the right to cross-examine the "real" witness who is, under the procedure permitted in

this case, out of court and thus shielded from the assessment of his demeanor by the jury. This assessment is one of the fundamental trial rights that are secured for the defendant in a criminal prosecution, under the confrontation clause of the Sixth Amendment. *Barber v. Page, supra,* 390 U.S. at 725; *Douglas v. Alabama,* 380 U.S. 415 (1965).

The right of confrontation and the right of cross-examination

> "have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect this right from erosion."
>
> *Greene v. McElroy,* 360 U.S. 474, 496-7;

cf. Pointer v. Texas, 380 U.S. 400.

The introduction of the damaging extrajudicial statements of Coleman (who had been arrested at the same time as petitioner but tried separately) through the testimony of agent Henry, by way of the "setting" exception to the hearsay rule, prejudicially subjected petitioner to the likelihood that the jury would believe that Coleman made the statements and that they were true.

Clearly, the introduction of Coleman's extrajudicial statements added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination. Since Coleman did not take the stand, petitioner was thus effectively denied his constitutional right of confrontation. *Bruton v. United States,* 391 U.S. 123, 127-8 (1968).

Moreover, the opportunity for cross-examination of

the law enforcement agent who testified and reported Coleman's damaging extrajudicial statements is not an adequate restorative to redress the prejudice sustained by the denial of petitioner's essential rights secured by the Confrontation Clause. *Douglas v. Alabama, supra,* 380 U.S. at 419-20.

Since the law officer's testimony only tended to show that Coleman made the incriminating statements, cross-examination of the officer as to the genuineness of the statements could not substitute for cross-examination of Coleman to test the truth of the statements themselves. *Motes v. United States,* 178 U.S. 458; *cf. Kirby v. United States,* 174 U.S. 47; *Douglas v. Alabama, supra.*

(B) Illegal Search and Seizure.

Assuming *arguendo* that the arrest of the petitioner was valid, and even assuming that the police were operating pursuant to a valid arrest warrant, the search of petitioner's car and the seizure of the narcotics within it were still prohibited by the Fourth Amendment to the United States Constitution.

Here, the petitioner was arrested in his room; then, subsequent to that arrest, and operating without petitioner's consent and without a search warrant, the officers went outside and searched the locked trunk of petitioner's parked automobile.

Subject to certain exceptions, the police must, whenever practicable, obtain advance judicial approval of searches and seizures through warrant procedures. *Katz v. United States,* 389 U.S. 347, 357 (1967).

In the instant case the only exception possibly applicable

to justify the search of petitioner's car is the search "incident to an arrest" exception. *Agnello v. United States,* 269 U.S. 20, 30 (1925).

It is clear that the scope of a search must be strictly tied to and justified by the circumstances which render its initiation permissible. *Terry v. Ohio,* 392 U.S. 1,19, 20 (1968).

Although granting, *arguendo,* that the rule of *Chimel v. California,* 395 U.S. 752, 762 (1969), is not controlling in this case, *Chimel* is nevertheless instructive in that it clarifies basic doctrine relating to the "search incident to an arrest" exception which was articulated in *Preston v. United States,* 376 U.S. 364 (1964). In *Colosimo v. Perini,* 415 F.2d 804 (6th Cir. 1969), the court used *Chimel* to clarify *Preston.* The court then held *Preston* controlling and suppressed the evidence.

Preston stated that the rule allowing searches contemporaneously to arrests is governed by the imminent exigencies of (1) seizing weapons which might be used to assault an officer, or (2) preventing the destruction of the evidence of the crime, when such weapon or evidence is on the accused's person or under his immediate control. The court noted that such justifications *are absent* where a search is remote in time or place from the arrest. *Preston, supra,* 376 U.S. at 367; *James v. Louisiana,* 382 U.S. 36, 37 (1965).

Once again *Chimel* is instructive in that, although it stated a "new rule" concerning searches "incident to an arrest," it felt that its "new rule" *did not modify* the prior law as to searches of vehicles. Thus, *Chimel* is useful insofar as it adumbrates the prior case law, which the Court states to be that officers may conduct warrantless searches of automobiles where there is probable cause and where it is

not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carroll v. United States,* 267 U.S. 132, 153 (1925); *Brinegar v. United States,* 338 U.S. 160 (1949); *Chimel v. California, supra,* 395 U.S. at 764 n. 9.

The significant fact is that the *Chimel* case collects and cites cases in which the search incident to the arrest was of an automobile moving on a public highway. Here, the car was parked and the trunk was locked. Moreover, the arrest of the petitioner was *in his apartment.* Under the reasoning of *Preston* such a search *cannot* be justified as incidental to an arrest, since it is remote in time and place from the arrest. *Chimel v. California, supra,* 395 U.S. at 764, 768. Furthermore, it is arguable that there was even probable cause for the search. In such a situation, any search would have been invalid. *Chimel v. California, supra,* 395 U.S. 752.

Under the doctrine of *Mapp v. Ohio,* 367 U.S. 643, and *Ker v. California,* 374 U.S. 23, it was constitutional error to admit the fruit of this illegal search into evidence at the petitioner's trial.

(C) Retroactivity of *Chimel.*

It is clear that under the standard promulgated in *Chimel,* the evidence obtained by the search of petitioner's automobile was constitutionally defective. The question is whether *Chimel* should be applied retroactively to protect petitioner and others similarly situated. This Court has expressly reserved judgment on the retroactivity of *Chimel. Von Cleef v. New Jersey,* 395 U.S. 814 (1969); *Shipley v. California,* 395 U.S. 819 (1969).

It is submitted that this case presents the issue of the retroactivity of *Chimel* squarely before the Court and provides it with the opportunity to make a definitive holding on this important constitutional issue. There is considerable dispute among the lower courts as to the extent of retroactivity that should be afforded to the rule in *Chimel*.

On the one hand some courts have held that the exclusionary rule of *Chimel* is to be applied only to evidence seized as the result of a search which was initiated *after* the decision of *Chimel* (June 23, 1969) and does not have retrospective application to cases which were not final before that date. *Williams v. United States*, 418 F.2d 159 (9th Cir. 1969); *Lyon v. United States*, 417 F.2d 91 (5th Cir. 1969); *People v. Edwards*, 80 Cal.Rptr. 633, 640 (1969); *Scott v. State*, 7 Md.App. 505, 256 A.2d 4 (1969).

On the other hand, some courts have held that *Chimel* does apply to cases pending on direct review as of the date of *Chimel*'s decision. *Fresneda v. State*, 415 F.2d 804 n. 28 (Alaska, 1969); *Colosimo v. Perini*, 4 (6th Cir. 1969) which apparently applied the "foreshadowing principle." See also *Von Cleef v. New Jersey, supra*, 395 U.S. at 817 (Harlan's concurrence); *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan's dissent).

(D) Prejudicial Introduction of Cocaine Evidence.

The evidence as to the cocaine was obtained as a result of an illegal search and seizure. The introduction of this evidence tended to establish in the minds of the jurors that petitioner was a trafficker in illegal drugs.

Once that association was forged, through the court's

failure to exclude the illegally obtained evidence, the jurors were predisposed to make the fallacious inference that petitioner had previously sold heroin. Although the inference which the illicit evidence tended to create–that one who sold drugs at a later time was therefore a seller at an earlier time–was defective as a variety of the *post hoc ergo proper hoc* fallacy, still, it was capable of creating a strong and prejudicial psychological persuasiveness.

The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-7 (1963).

An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot under *Fahy* be conceived as harmless. *Chapman v. California*, 386 U.S. 18, 23-4 (1967).

CONCLUSION

For the above-stated constitutional defects in this case, the requested writ of certiorari should be granted.

Respectfully submitted,

MARKS, SHERMAN & LONDON

BY: BURTON MARKS

Attorneys for Petitioner

APPENDIX

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B	**Order Rejecting Petition for Rehearing *En Banc***	2

APPENDIX A

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. DELANO B. KELLEY, Defendant and Appellant.

No. 24,392.

[April 10, 1970]

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS and TRASK, Circuit Judges, and JAMESON, District Judge*

PER CURIAM:

The judgment of conviction in this narcotics case is affirmed.

There was a conviction by a jury on two heroin counts and one on cocaine. If the cocaine count stood alone, *Turner v. United States,* ..... U.S. ....., 24 L.Ed. 610, would require a reversal.

As to the heroin counts, there are contentions of inadequate representation of counsel, objections to admission of allegedly hearsay testimony, and now an exception is taken to a jury instruction on possession.

The possession instruction actually was favorable to Kelley. We find that the representation was reasonably competent and not a sham.

The hearsay was admitted for a very limited purpose to show "setting" and the jury was carefully cautioned as

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*The Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

to its use. There was no such caution sounded in *Sanchez v. United States*, 8 Cir., 293 F.2d 260, which appellant heavily relies upon.

APPENDIX B

ORDER REJECTING PETITION FOR REHEARING *EN BANC*

[Caption–Case No. 24,392]

[October 2, 1970]

Before: CHAMBERS and TRASK, Circuit Judges, and JAMESON, District Judge.

The panel as constituted in the above case has voted to reject the petition for rehearing *en banc.*

The full court has been advised of the suggestion for an *en banc* hearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc.* Fed. R App. P. 36(b).

The petition for rehearing *en banc* is rejected.

–0–

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on OCTOBER 19th, 1970, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (DELANO B. KELLEY v. UNITED STATES) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

OFFICE OF THE SOLICITOR GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 19th, 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES FORWARDED TO THE CLERK, UNITED STATES SUPREME COURT, WASHINGTON, D. C. 20543

Dean-Standefer Co., 322 Main St., Huntington Beach, Ca.
(714) 536-7161

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 880

DELANO B. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1970. A petition for rehearing was denied on October 2, 1970. The petition for a writ of certiorari was filed on October 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of a third-party conversation as background evidence of a

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directly proven narcotics transaction constituted prejudical error in the circumstances of this case.

2. Whether the admission into evidence of cocaine seized during a search of a movable vehicle requires reversal of independently proven heroin convictions.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts charging the illegal sale of 23.880 grams of illegally imported heroin on August 18, 1967, in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a), and the illegal importation of 24.700 grams of cocaine on August 21, 1967 in violation of 21 U.S.C. 174 (Tr. 167–169, 173).[1] He was sentenced to concurrent six-year prison terms on each count (Tr. 191). The court of appeals affirmed *per curiam*.

The record shows that an agent of the Federal Bureau of Narcotics placed a telephone call on August 8, 1967 regarding a proposed purchase of heroin. The agent initially testified that the call had been to petitioner. It shortly became apparent, however, that the call had not been to petitioner, but to a confederate named Coleman.[2] The testimony was corrected (Tr. 56), but an objection was made to its admission on grounds of hearsay. Government counsel stipulated that the testimony was not to be admitted to show the truth of the conversation but to show setting. The trial judge

[1] "Tr." designates the one-volume trial transcript which we are lodging with the Clerk.

[2] Coleman was indicted with petitioner but not tried with him.

admitted the testimony for this limited purpose and instructed the jury accordingly (Tr. 13–22). The agent then testified that he met with petitioner that same day and purchased heroin from him (Tr. 28–31).

On August 21, 1967 the agent called petitioner with respect to a previously arranged purchase of cocaine. He went to petitioner's apartment, bringing the purchase money with him. Petitioner left with an unidentified male and returned a short time later. The other person drove off, and petitioner and the agent went to the apartment. Petitioner told the agent that the cocaine was in his car and gave the agent the keys. The agent told petitioner that he had to get the money from his car and returned the keys to petitioner. The agent went outside and signalled other agents who arrested petitioner inside his apartment as he was attempting to put his car keys down the garbage disposal. The keys were used to open petitioner's car and the cocaine was seized (Tr. 40–54, 80–84). A motion to suppress the cocaine as the product of an illegal search was denied (Tr. 84–92).

ARGUMENT

1. The actual purchase of heroin from petitioner on August 8, 1967 was established by the testimony of the purchasing agent who dealt directly with petitioner (Tr. 25, 28–31). The testimony of the agent concerning the phone conversation he had earlier that day was not offered for the truth of the statements contained therein but for the limited purpose of illuminating the events relating to the purchase of the heroin. The jury was appropriately instructed that

the conversation was "not offered for the truth or falsity of what was there said but for a different and limited purpose of indicating apparently what arrangements were made and to throw light on subsequent events" (Tr. 19). In this setting, petitioner's claim (Pet. 6–8) that he was denied his right of confrontation is wide of the mark.[3]

2. The two counts relating to the heroin transaction on August 8 were proven by direct evidence concerning those transactions. While not arguing otherwise, petitioner contends that introduction of the cocaine nevertheless tainted his convictions on those counts in light of the fact that the court below deemed the conviction involving the August 21 cocaine transaction invalid under *Turner* v. *United States,* 396 U.S. 398.[4] There can be little doubt that the jury was able to distinguish between the separate evidence relating to the discrete heroin and cocaine transactions which occurred two weeks apart. It is plain, moreover, that the cocaine was properly admitted as the fruit of the incidental search of a movable vehicle.

Petitioner had informed the undercover agent of its location in the trunk of his car and was attempting to dispose of the keys when arrested. The agents had reason to fear that petitioner had an accomplice in

[3] The agent's inadvertent references to petitioner as the recipient of that call were completely corrected (Tr. 56). There could have been no doubt in the jury's mind that Coleman and not petitioner was the party that the agent called.

[4] This was presumably because the trial court instructed the jury that proof of possession of the cocaine would authorize the jury in concluding that petitioner knew it had been illegally imported (Tr. 169; see *Turner*, *supra*, 396 U.S. at 418–419).

the area who could have removed the car or the drugs if a search and seizure was not made. The case is governed by *Chambers* v. *Maroney,* 399 U.S. 42, and accordingly there is no reason to defer disposition of the petition until after this Court decides the question as to the retroactivity of *Chimel* v. *California,* 395 U.S. 752.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
PAUL J. SCHAEFFER,
Attorneys.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970